No. 89-1718

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BANQUE DE PARIS ET DES PAYS-BAS,

Petitioner,

—v.—

EXXON COMPANY, U.S.A.,
A DIVISION OF EXXON CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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Banque de Paris et des Pays-Bas (now known as Banque Paribas) (the "Bank")[1] submits this brief in reply to the Brief in Opposition of Exxon Company, U.S.A. ("Exxon") and in further support of the Bank's petition for a writ of certiorari.

ARGUMENT

Exxon's strategy in opposing this petition is both predictable and understandable: try to bury the important institutional questions presented by recasting the petition as presenting nothing more than the question whether, after *Kerr Construction Co.* v. *Plains National Bank*, 753 S.W.2d

1 The parent and non-wholly-owned subsidiaries of the Bank are listed in the Appendix to the Bank's petition for a writ of certiorari ("App."), at pages 60-67.

181 (Tex. App.—Amarillo 1987, writ denied), the court of appeals *finally* understood that Texas law provides that "letters of credit are governed by the same maxims of construction as ordinary contacts [sic]." (Brief in Opposition ("Opp.") 7). Fully nine of the fourteen pages of the Brief in Opposition are devoted to this effort. Of course, if Exxon's recharacterization were correct, the petition would raise an issue of no conceivable interest to this Court. (*See* Petition ("Pet.") 3).

But Exxon is not correct. This petition is not concerned with whether *Kerr* was correctly decided; nor is it concerned with Texas letter of credit law when a conflict exists between the presentment terms and the expiry date. Rather, this petition raises issues of systemic importance that in no way depend on the actual content of Texas law. The petition focuses on the *process* that the Fifth Circuit wrongly understood to be obligatory in determining the content of the applicable state law once any intermediate state court has addressed the issue. And as the Bank has said, precisely because this Court does not review the particular determinations of applicable state law in diversity cases it is imperative that this Court ensure that diversity courts proceed in a correct manner in determining state law. (Pet. 6).

I.

Once Exxon's effort to deflect attention from the issues actually raised by the petition is unmasked, the weakness of its opposition to certiorari becomes apparent. Exxon first denies the existence of any deeply-entrenched Fifth Circuit policy that accords virtually absolute deference to *any* pertinent intermediate appellate court decision. (Opp. 8). This argument is made in the face of contrary decisions in the Fifth Circuit. (*See* Pet. 8). "Only where no state court has decided the point in issue may a federal court make an educated guess as to how that state's supreme court would rule." *Benante* v. *Allstate Ins. Co.*, 477 F.2d 553, 554 (5th Cir. 1973); *see also Sifers* v. *General Marine Catering Co.*, 892

F.2d 386, 397 (5th Cir. 1990); *Colorado Interstate Gas Co.* v. *Hufo Oils*, 802 F.2d 133, 140-41 (5th Cir. 1986); *Birmingham Fire Ins. Co.* v. *Winegardner & Hammons, Inc.*, 714 F.2d 548, 550 (5th Cir. 1983); *Mott* v. *Mitsubishi Int'l Corp.*, 636 F.2d 1073, 1074 (5th Cir. Unit A Feb. 1981).

The petition stresses that the crucial difficulty with the Fifth Circuit's policy is that, contrary to *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), it gives federal court litigants a brand of justice inferior to that accorded in the state courts. (Pet. 8-10). This is the necessary consequence of a policy that, in determining state law, accords to a single decision of a state intermediate appellate court greater weight than it would be accorded by the state's highest court or indeed by any of the thirteen other Texas intermediate appellate courts. The petition submits that the Fifth Circuit's policy is completely at odds with this Court's decision in *Commissioner* v. *Estate of Bosch*, 387 U.S. 456 (1967). (Pet. 10-12).

Exxon's response to *Bosch* is startling. Exxon argues that *Bosch* is irrelevant because *Bosch* was not a diversity case. (Opp. 11). This argument is far wide of the mark. This Court, lower federal courts and commentators understand that the analytical approach set forth in *Bosch* for determining the content of relevant state law is fully applicable to diversity cases. *See, e.g., Tafflin* v. *Levitt*, 110 S. Ct. 792, 798 (1990) (citing *Bosch* for the proposition that "federal courts sitting in diversity are guided by state court interpretations of state law"); *Gruber* v. *Owens-Illinois Inc.*, 899 F.2d 1366, 1369 (3d Cir. 1990) (finding *Bosch* provides the "current practice [for ascertaining state law] in diversity cases"); *Ground Air Transfer, Inc.* v. *Westates Airlines, Inc.*, 899 F.2d 1269, 1275 (1st Cir. 1990) (citing *Bosch* as the current standard for ascertaining state law in a diversity case); J. Friedenthal, M. Kane & A. Miller, *Civil Procedure* 220 (1985); 19 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4507, at 88 (1982). Indeed, *Bosch* itself explicitly recognized that its analysis applied whenever the content of state law serves as the applicable rule of decision

in federal court. This, of course, includes the diversity context:

> *This is not a diversity case but the same principle may be applied for the same reasons, viz.*, the underlying substantive rule involved is based on state law and the State's highest court is the best authority on its own law. If there be no decision by that court then federal authorities must apply what they find to be the state law after giving "proper regard" to relevant rulings of other courts of the State.

387 U.S. at 465 (emphasis supplied); *see also id.* at 477 (Harlan, J., dissenting, joined by Fortas, J.) (stating their understanding of "the formula now ordinarily employed to determine state law in diversity cases" to be that "absent a recent judgment of the State's highest court, state cases are only data from which the law must be derived").

It is apparent, however, that the Fifth Circuit's policy of "conclusive regard" has effectively supplanted the "proper regard" for state intermediate appellate court decisions that *Bosch* mandates. Indeed, Exxon virtually concedes the point. It defends the court below (Opp. 10) by placing reliance on *West* v. *American Tel. & Tel. Co.*, 311 U.S. 233, 237 (1940), and two other decisions in Volume 311 U.S.—"the excesses of 311 U.S.," as Judge Friendly described them. (*See* Pet. 11). To the extent that *West* supports the Fifth Circuit's deference policy it is in conflict with *Bosch* and should be rejected. (*See* Pet. question (2), 10-12).

The need for this Court's corrective action is especially evident from the bizarre outcome in this case. Because of a single, unreasoned intermediate state court opinion, the Fifth Circuit felt obliged to reverse itself and affirmatively reject "sound commercial policy" (App. 7) in a case involving a common commercial instrument. Indeed, in the Fifth Circuit the only way a litigant can avoid the conclusive effect of a single intermediate appellate court holding is somehow to prove an impossible negative; *i.e.*, that the intermediate court holding is not the law of the state. *E.g.*, App. 3, 4; *Sifers*,

892 F.2d at 397; *Colorado Interstate Gas Co.*, 802 F.2d at 140-41; *Birmingham Fire Ins. Co.*, 714 F.2d at 550; *Mott*, 636 F.2d at 1074. *Erie* does not permit the federal appellate courts to cede so much decision-making authority to the decisions of inferior state courts.

II.

Exxon's attempt to dismiss the conflict in approaches between the Fifth and Third Circuits is also illuminating. This conflict is asserted to be "purely imaginary." (Opp. 12). But the conflict is real, as is apparent from Exxon's lame effort to distinguish two Third Circuit decisions as cases that are "*sui generis*." (Opp. 13). Moreover, the conflict has been brought into even sharper focus by the Third Circuit's very recent decision in *Gruber* v. *Owens-Illinois Inc.*, 899 F.2d 1366 (3d Cir. 1990). There, in an extended discussion relying upon *Bosch*, the court emphasized yet again that it could not be bound by a holding of an intermediate state court.

The genuine conflict among the circuits on the approaches diversity courts take in determining and applying state law is further revealed in the recent First Circuit decision, *Ground Air Transfer, Inc.* v. *Westates Airlines, Inc.*, 899 F.2d 1269 (1st Cir. 1990). In that diversity case (which, coincidentally, involved a letter of credit), the First Circuit undertook a painstaking independent analysis of controlling California law. On the basis of that analysis, and relying specifically on *Bosch*, the First Circuit rejected the views of two California intermediate appellate courts because the First Circuit was convinced the California Supreme Court would hold differently. *See id.* at 1275. In so doing, the process by which the First Circuit determined state law differed radically from the policy of deference consistently followed by the Fifth Circuit.

The Bank submits that it is quite apparent that the circuits have adopted widely divergent processes when faced with determining the deference due intermediate state court opinions. This petition presents the Court with a salutary occa-

sion to resolve this systemic problem and provide much needed guidance to the lower federal courts to ensure that *Erie* retains its vitality as an "expression of the federal system and the concomitant integrity of the separate States." *Ferens* v. *John Deere Co.*, 110 S. Ct. 1274, 1280 (1990).

CONCLUSION

For the foregoing reasons and those set forth in the Bank's petition, the petition for a writ of certiorari should be granted.

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June 11, 1990

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